United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1779

To be argued by
JOSEPH ARTHUR COHEN

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

MICHAEL T. ANDERSON,

Plaintiff-Appellee,

—against—

GREAT LAKES DREDGE & DOCK CO.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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Preliminary Statement

Plaintiff brought this action to recover damages for personal injuries sustained by him on October 18, 1970 while operating a small winch aboard the dredge No. 50, a vessel owned by the defendant. He obtained a recovery of $500,000 (the amount of the *ad damnum* in plaintiff's complaint) reduced to $250,000 on account of plaintiff's contributory negligence which the jury assessed at 50%.

Appropriate post-trial motions by defendant for judgment n.o.v. or, alternatively, for a new trial were denied by the Court below (A995).*

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* Unless otherwise indicated, all references are to the Appendix on Appeal.

The grounds for this appeal by defendant may be broadly categorized as follows:

1. Defendant's trial and post trial motions for judgment because of plaintiff's failure to prove any causal relationship between the happening of the accident and defendant's alleged negligence should have been granted.

2. The erroneous rulings and highly partisan and prejudicial conduct of the Trial Judge deprived defendant of a fair opportunity to litigate its case before a jury, and at the very least a new trial should be granted.

3. The award to the plaintiff of $500,000 (prior to reduction for contributory negligence) was so shockingly high as to be legally excessive.

Although each of these points will be discussed *seriatim*, with appropriate references to the record, we believe it will prove helpful to the understanding of this Court if at this point a broad overview of the conflicting trial contentions is presented. This overview should give appreciation of the manner in which the defendant's ability to fairly present its case was undercut and impaired by the Trial Judge.

The Issues on Trial

The accident forming the basis of this lawsuit was *unwitnessed*. At the time of the accident plaintiff was operating a rather small tugger winch which had a rotating drum 10″ wide and 24″ in circumference. The drum of the winch was made to rotate in one direction or another by means of a lever rotated on the right hand side of the winch. This lever was only 12″ away from the rotating drum.

As the plaintiff was taking in on the tugger winch, he was standing, according to his own testimony, to the left hand side of that moving wire. He was leaning over the moving wire so as to operate the winch lever with his right hand, and with his left hand he was physically touching or tapping the moving wire. He claimed that he was suddenly precipitated into the winch.

Plaintiff's attorney contended in his opening (A9-11) that there was some defect on the moving wire which caught plaintiff's hand and also that defendant was at fault because the operation of this winch should have required three men.

In his opening, defendant's attorney responded to these claims by advising the jury that he would show that only two months before the plaintiff had given a sworn deposition that there was nothing wrong or defective about either the winch or its cable. That deposition of the plaintiff was of great value to the defendant because plaintiff had also testified therein that he did not know what had happened or why, and it further contained some voluntary statement by the plaintiff alluding to the possibility of some motion in the water having caused him to lose his balance. This tied in with an admission by plaintiff while in the hospital that he fell into the winch because of some swell in the water (A610). The importance of plaintiff's deposition to the defense is being stressed at this time because of the bizarre and erroneous rulings of the Trial Judge that effectively prevented defendant from impeaching the plaintiff with his own deposition.

It was defendant's further contention that the operation of a small winch such as this was only a one-man job and that immediately following the accident, one man, DeGraff, completed the task that plaintiff had begun. Defendant further contended that plaintiff operated the winch in an

unsafe and improper fashion by (a) positioning himself on the left hand side of the moving wire so that he had to place his body over that wire as he operated the lever on the right hand side, and (b) in touching or tapping the moving wire cable with his left hand to guide it.

POINT I

Plaintiff Failed to Adduce Any Proof of a Causal Relationship Between the Happening of the Accident and Defendant's Negligence.

In his opening statement to the jury, plaintiff's attorney particularized the defendant's fault as twofold (A11):

> "Of course our claim is that there was insufficient help in doing the job, and we also claim that there must have been a defect of some kind in this wire to catch his glove on and basically that is what the case is about."

The entire width of the winch the plaintiff was operating was 22", and the rotating drum part of the same was only 10" wide (Defendant's Exhibit A-2). It is operated by a lever on the right hand side and the positioning of that lever by the operator determines the rotational direction of the winch drum (A190).

The plaintiff was operating the winch so as to bring the wire back on to the rotating drum. He was standing to the left of the moving tugger wire (A92) and had his body bent over the same while he operated the winch lever on the right hand side of the winch with his right hand (A214). With his left hand the plaintiff was patting the moving tugger wire (A76). In this position, the plaintiff's back was to the door of the cab (A218). It was plaintiff's testimony that after taking on 3 turns of the wire somehow his left

hand got caught and he was pulled into the rotating winch drum (A76).

In support of the claim made in his opening statement, plaintiff's attorney developed on direct examination of the plaintiff that this was a 3 man job: one man to move the winch lever; a second man to pat and guide the wire onto the winch drum; and a third man to stand at the door of the cab to relay any signals or instructions from the man working on the adjoining scow (A74). No defect in either the winch or its wire was developed by plaintiff's attorney.

However, at this point (A76-82) the Trial Judge took over the direct examination of the plaintiff and developed (A80) *his belief* that a fish hook on the wire caught his left hand and pulled him into the winch. *Indeed, the Court then invited questions to be put to the plaintiff by the jury,* and several jurors availed themselves of this opportunity (A81-82). The Court by its questions emphasized that the plaintiff's hand got caught on a fish hook (A81).

When, on cross-examination by defense counsel, plaintiff admitted that he neither saw nor knew of any such fish hooks—and he re-affirmed his deposition testimony to such effect—(A229-231), the Trial Judge intervened and established that plaintiff *deduced* that there *must have been* a fish hook (A231-234) and denied defendant's motion to strike such testimony (A234).

There was no testimony from any fact witness about the presence of fish hooks in the wire, although theoretical questions about fish hooks and the employer's duty to inspect for the same were asked by plaintiff's attorney of his expert witness, Captain Ash, over objection by the defendant (A569-573).

Finally, after all testimony was in, except for defendant's doctor, the Court granted defendant's earlier motion to

strike all testimony relating to fish hooks (A744). As there was no proof whatever in the record of any defect in the winch or its wire, the only claim remaining was that the accident happened because defendant supplied an inadequate number of men, and the jury was so charged (A880).

Although there was indeed a disputed fact issue as to how many men are required for this task of operating the tugger winch (A647, A690), there was never any proof to show how an inadequate number of men could have caused the accident. In other words, plaintiff claimed that there should have been a signal man standing at the door of the cab some 7 feet away from him (A218) to relay any signals from the men on the scow. How the absence of such a man could have caused plaintiff to go into the winch was never established, and it is significant to note that plaintiff's own witness, Ducey, testified that he had had no signals to transmit to the plaintiff (A362).

Similarly, even if as plaintiff claimed there should have been a third man present to operate the winch lever, it was never established how the absence of such a man caused plaintiff's left hand (with which he was patting the moving wire) to get caught in the winch.

Defendant does not dispute that under the law liability may be predicated upon an inadequate or insufficient crew, *Waldron* v. *Moore-McCormack Lines, Inc.*, 386 U.S. 724, 87 S. Ct. 1410; *American President Lines, Ltd.* v. *Welch*, 377 F.2d 501. But, in the cited cases the insufficiency of the crew resulted in the injured lifting or carrying more than one man should and sustaining injury by reason thereof. The lack of an adequate number of men was thus, in the cited cases, the proximate cause of the injuries. In the instant case, there has been no proof at all that the absence of 2 other men—one to stand at the door and act as signalman and the other to operate the winch lever—

caused the plaintiff's left hand (which he was using to tap the moving wire) to be pulled into the winch. The "how" and "why" of this accident and their proximate relationship to defendant's negligence has not been at all established.

The proposition that it is the plaintiff's burden to develop prima facie proof of each element of his claim does not require extended citation. But it is not enough for a plaintiff to merely establish the happening of an accident and some unseaworthy condition or negligent act of the defendant. Plaintiff must further establish that the negligent act was the proximate cause of the injury, *Blier* v. *United States Lines Company*, 286 F.2d 920. As stated in *Blier* by this Court at p. 925 of 286 F.2d:

> "To be a proximate cause there must be a direct causal connection between the unseaworthiness or negligence and the injury. In other words, there must be an unbroken chain of events flowing from the unseaworthiness or negligence and leading to the injury."

Such an unbroken causal chain was in nowise established by the plaintiff in this case. Regardless of how many other men might have been in the cab with him, so long as he tapped the moving wire with his left hand, the accident would still have occurred. For this failure to prove a prima facie causal chain, the action should have been dismissed on defendant's trial (A603-605, A750, A794) and post trial motions.

POINT II

By Its Obvious Advocacy of the Plaintiff's Claim, Its Hostility to the Defense and Its Erroneous Rulings Which Prevented Defendant From Fairly Presenting Its Position, the Trial Court Committed Reversible Error.

Bearing in mind that this case involves an *unwitnessed* accident, the issue of plaintiff's credibility was understandably most important. As will be shown *infra*, the Trial Judge's continuous interference, which admittedly was to unusual degree (A995), was always helpful to the plaintiff and antagonistic to the defendant. In addition, the Trial Judge made a number of erroneous rulings which effectively impaired the defendant's ability to demonstrate plaintiff's lack of credibility—even to the point where defendant was not able to impeach plaintiff with his own executed deposition! And, in its charge, the Trial Court became an open advocate for the plaintiff and advanced *arguments* in his behalf. Notwithstanding the latitude that a Federal Judge has to comment on the evidence, there are limitations and he may not become a partisan advocate and seek to impress his conclusions on a jury. The improprieties may be categorized as follows:

a—*The continuous interference in the trial to the favor of the plaintiff.*

Early in the trial (A76-82) the Trial Judge took over the direct examination of the plaintiff to get before the jury testimony that plaintiff *believed* there was a fish hook in the wire, even though he didn't see or feel one. Not only was elicitation of such testimony improper, but in so taking over the direct examination for plaintiff's attorney,

and in then inviting and permitting the jury to question the plaintiff (A81-82), the Trial Judge began to evince his partiality to the plaintiff and to create an empathy for him.

Following its direct examination of the plaintiff, the Court repeated the plaintiff's claim to the jury (A83) and guided the plaintiff through a demonstration (A86-88).

When cross-examination by defendant began to develop that plaintiff neither saw nor knew of any fish hooks or other defects on the wire (A229-231), the Court rushed to plaintiff's aid, interfered with the cross-examination, and elicited testimony that there *must have been* a fish hook. Defendant's motion to strike such testimony was denied by the Court who lectured defense counsel to be patient with the witness because in the Court's view he was not accustomed to expressing himself (A234).

Although plaintiff was represented by experienced and able counsel, the Court continuously took over the direct examination not only in the liability phase (A93-94) but also to elaborate on the claim for pain and suffering (A115-116).

When defendant was laying a foundation to impeach the plaintiff with his own deposition, the Court interrupted the cross-examination to elicit from plaintiff that he was "nervous" at the taking of his deposition (A246-247).

The Court told the jury that defendant's effort to impeach the plaintiff was a *"very little item"* (A249), and then recessed for the day. Defense counsel was then berated by the Court for *"pulling the wool over the jury's eyes"* (A259) in his efforts to use the plaintiff's deposition for impeachment.

The following morning, the Court began by repeating to the jury that plaintiff was *frightened and fearful* on his deposition (A266-267). Thus, was the initial "nervousness" judicially exacerbated.

The erroneous rulings then made by the Court regarding defendant's efforts to use plaintiff's deposition, and the highly emotional and prejudicial "Ardizzone incident" will be discussed *infra*. But when plaintiff's first witness, Ducey, was called out of turn (A308) plaintiff's attorney established only some preliminary, background material before the Court took over and led this witness to testify that Captain De Graff had ordered the plaintiff's brother away from the door of the cab where he had been stationed to convey signals (A320). Again, the Court put in plaintiff's case by developing opinion testimony from Ducey that at least 2 men are required to operate the tugger winch (A321-324).

Over objection of the defendant, the Court permitted testimony from Ducey as to the rate of pay of dredge operators—even though plaintiff was not an operator and had not even begun the breaking in process (A325-330).

It was the Court who developed from Ducey testimony as to what job progress plaintiff might have made, notwithstanding Ducey's statement that he doesn't know who will progress to operator, and his high regard for the plaintiff (A326-332).

When defendant cross-examined Ducey to establish that he had had no conversation with Captain De Graff whereby plaintiff's brother was taken away from the job at hand, the Court again interfered to develop that there was such a conversation (A343).

On redirect examination of Captain Ash, his expert witness, plaintiff's attorney asked for opinion testimony as to

whether or not a wire with "fish hooks" in it is unsafe (A569). The defendant objected because there had been no testimony by any fact witness to establish the presence of fish hooks in the wire, but the Court held that there had been enough testimony regarding the same to create a *"surmise"* and permitted the testimony (A570-571). To compound the harm, the Court then took over the questioning of Captain Ash on this point and developed testimony regarding the employer's duty to inspect for fish hooks and the necessity to discard a wire containing the same (A571-572).

When defendant developed from its witness, De Graff, that following the accident he alone completed the job plaintiff had been doing (A627) and sought to develop precisely how he had done so, there was an extended side bar conference and defense counsel was brusquely told to suspend De Graff and call another witness at this critical juncture of his testimony (A628-634).

Defense efforts to then establish from Capt. Wheeler, a maritime expert, that this winch drum was "free-spooling" and did not require the wire to be taken on with loops precisely along side each other (in order to establish that there was no need for plaintiff to touch the moving wire) was precluded by the Court and the witness chastised (A639).

Defense efforts to establish from Capt. Wheeler that similar free-spooling winches are customarily found on the cargo ships coming into New York and that only one person is required to operate the same and such person should never touch the moving wire were also not permitted by the Court *for the reason that Capt. Ash had testified to the contrary for the plaintiff* (A640).

On cross-examination by plaintiff's attorney, Captain Wheeler testified that since it is a free-spooling drum it

is not important for the wire to be guided on for the first three turns (A657), at which point the Court took over the cross-examination as follows:

> "The Court: Well, suppose it is not important, but the operator wanted to do a precise job?
> The Witness: Fine.
> The Court: That happens, doesn't it?
> The Witness: Yes, sir, it does.
> The Court: *We are not going to flay him because he wants to do it closer to perfection?*
> The Witness: That's right, sir."

Thus did the Court suggest that to defend this case was equivalent to punishing a worker for wanting to do an excellent job.

b—*The Court improperly and erroneously prevented defendant from impeaching plaintiff with his sworn deposition, and did so in a manner that continually demeaned and castigated defense counsel and was highly prejudicial to the defendant.*

Again, the importance of the credibility issue where we are dealing with an *unwitnessed* accident must be remembered. The defendant sought to impeach plaintiff's courtroom testimony by reason of several contradictory statements made in his sworn deposition that was taken only 2 months prior to the trial.

Thus, defense counsel obtained an admission from plaintiff that upon his deposition 2 months ago he had testified that he didn't know what happened at the time of the accident (A229-230). The Court then interfered with the cross-examination and elicited from the plaintiff that he had been "nervous" and had answered the question that way twice and contrarily a hundred times (A230).

In view of this claim by plaintiff and the Court's statement that he had limited powers of understanding and expression (A234), defense counsel sought to read portions of the deposition to the plaintiff to ascertain if there was any part he didn't understand (A235). That portion of plaintiff's deposition wherein he testified that after taking 3 turns of the wire around the drum of the winch something happened and he doesn't know what occurred was then read (A238). However, the Court interrupted the cross-examination and developed that plaintiff was scared and nervous and what he wanted to say didn't come out right (A239).

To meet this contention, defense counsel developed that subsequent to the taking of his deposition, and prior to its execution the day before trial, the plaintiff had read it over *in toto* on 2 occasions and in part on additional occasions (A240-242).

Defense counsel then sought to develop that on none of the prior occasions when plaintiff read his deposition did he make any corrections in the same so as to give accurate expression to anything that he claimed was inaccurate (A243), but an objection to this line of inquiry was sustained by the Court who stated that the plaintiff has testified that his answers on the deposition were due to "fear" and apprehension" (A244).

To meet this claim, defense counsel then sought to establish that when the plaintiff read over the written transcript on the prior occasions he did so in the comfort and privacy of his own home and was not nervous (A245). Defense counsel asked the plaintiff whether at the time that he read over the written transcript in his own home he made any changes so as to better express what he now claims he wanted to express (A245); *and defense counsel was be-*

rated by the Court and told that he was wrong on the basis that a party has no power to correct or change a deposition prior to execution (A245-246). The Court took over the proceedings at that point and led the plaintiff through testimony that although the transcription of the deposition was accurate, some of the answers were not because they were given while the plaintiff was nervous (A246-247). Defense counsel then requested a charge to the jury that under the Federal Rules of Civil Procedure a witness is permitted to make corrections in his deposition prior to execution and the Court refused to so charge (A247). We again asked for a charge to the jury that the law permitted a party to correct his deposition and the Court refused to do so and stated that *all the Court is concerned with is what is the witness' sworn testimony as he sits on the stand* (A248). Earlier contradictory testimony was thus held unimportant and inconsequential. This was extremely prejudicial in view of the credibility issue.

It was at that time, 4:30 P.M., and defense counsel requested a conference with the Court, opposing counsel and the court reporter in the absence of the jury. In excusing the jury for the day, the Court told them that the impeaching point that defense counsel had been seeking to make was a *"very little item"* (A249).

With the Court's characterization of defendant's attempt to impeach the plaintiff on the basis of the plaintiff's deposition as a "very little item" ringing in their ears, the jury was recessed to the following morning.

Then, outside the presence of the jury defense counsel asked for a mistrial on the basis that the Court's statements to the jury had completely emasculated the defendant's contention that the plaintiff's testimony on direct examination in Court is a fabrication and contradicted by sworn testimony that he gave on his deposition two months

before. Defense counsel specifically pointed out to the Court on this motion for a mistrial (A250) that the rules permit corrections to be made in the transcript at the time of execution and that the Court's statement to the jury that no corrections are permitted prevented the defendant from showing the jury that even on several readings of the transcript in the privacy of his home and at a time when he was not nervous, the plaintiff found no inaccuracies that needed correction.

The Court fully appreciated the seriousness of the point being presented by defense counsel as is evident by the following statement by the Court (A253-254):

> "What I wanted the jury to get is what this witness's position is because you have already made it clear in the opening and in your cross-examination that you were going to show that his answers were not truthful answers, *and you came almost to nailing that down* because he said, 'My answers were not accurate and they weren't accurate because I was nervous', and what you are incensed about is that he didn't change those answers to reflect the truth under circumstances at his home when he was not nervous, and my answer to that is that he was never so instructed that he could change it to accord with the truth and to be more accurate. Mr. Danahar, you, as a lawyer, do you say on the record that you told him he could change it if it was not accurate?" (Italics added.)

Plaintiff's attorney, Mr. Danahar, then stated that he had not advised his client that corrections could be made. On the basis of that *unsworn* statement by plaintiff's attorney, Judge Cooper denied the motion for a mistrial and continued in his refusal to charge the jury that a

party has the right to make corrections in his deposition, even though Judge Cooper stated (A257):

> "Frankly, I don't hesitate to say, since Mr. Cohen raised it that I have considerable doubt as to whether this witness entertained at the time of the deposition the fear and apprehension that he says".

The Court then again berated defense counsel by saying that to inform the jury that a party has the right to correct the transcript of his deposition prior to execution "would be pulling the wool over the jury's eyes".

Upon the resumption of trial the next morning, the Court embarked upon a charge to the jury and restated the plaintiff's testimony about fright and fear (A266-267) and asked questions of the plaintiff as to whether on any of the occasions that he read his deposition prior to executing it he was informed that he had the right to make corrections (A269-270). The defendant's objection to that question was overruled and the defendant was given an objection to the entire line of inquiry being held by the Court (A270). The Court then developed from the plaintiff that plaintiff's attorney had not told him that he could make changes or corrections in the transcript (A270-271). *The Court then advised the jury of the unsworn statement given by the plaintiff's attorney* in the robing room the day before that he had not informed his client that any inaccuracies could be corrected (A272-273). The Court then continued to charge the jury that no corrections were made in this transcript and the Court stated (A274-275):

> "And I say to you further and tell you it is the law that no witness can be held accountable for not making a change if he was not advised that he had that

power, or had that right to record, or have recorded a change".

Although Judge Cooper then read to the jury the Federal Rule permitting the making of changes in a transcript (A279), he repeated that under the law the plaintiff could not be accountable for failing to make any necessary changes in his deposition if his own attorney had neglected to tell him that he could do so (A280-281). The defendant renewed its motion for a mistrial, which motion was again denied (A281).

The Court then continued to instruct the jury (A286) that they may have been mislead by defense counsel regarding the ability of the plaintiff to make changes in his deposition. The Court *repeated to the jury the unsworn statement of plaintiff's attorney* and reemphasized that the defendant could not hold the plaintiff accountable for not correcting any errors in his deposition transcript since plaintiff's attorney had not advised him that he could; and in connection with the defendant's offer to put the entire deposition in evidence Judge Cooper then continued to chastise and rebuke defense counsel (A287-288). At this point defense counsel was compelled to make the following statement for the record (A288):

> "Mr. Cohen: I would like to say for the record that unfortunately I am placed in a position of confrontation with the Court which is, I believe, an unfortunate thing. A climate has been created in this courtroom where I cannot possibly properly represent the interests of my client. I regret very much it has come about, your Honor. We have known each other for a long time. I sincerely regret under all the circumstances I am really compelled to renew my motion for a mistrial. I don't think I can properly do justice for my client in this case.

> The Court: Very well, that is your opinion. I see no reason why a Judge should not have the right to say what he thinks, and I intend to say it as long as I draw a breath.
>
> You may not like it, sir. I say again to you that you were wrong."

Can there really be any doubt but that a party is permitted to make changes or corrections in the transcript of his deposition prior to execution? Rule 30(e) of the Federal Rules of Civil Procedure sets forth both the right to and the manner of making changes or corrections in the deposition transcript, and states in pertinent part:

> "Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them."

See, *De Seversky* v. *Republic Aviation Corporation,* 2 F.R.D. 113; and *Colin* v. *Thompson,* 16 F.R.D. 194, 195 wherein the Court stated:

> "There is no doubt of the right of the witness—the plaintiff—to change either the 'form or substance' of his answers given in his deposition, provided he complies with subsection (e) of Rule 30 by stating to the notary-reporter his reasons for those changes."

Nor can there be any doubt about the defendant's right to impeach the plaintiff and his credibility by reason of contradictory or inconsistent statements made in the latter's deposition. As expressly stated in Rule 32(a)(2):

> "The deposition of a party * * * may be used by an adverse party *for any purpose.*" (Italics added.)

The defendant was well within its rights in seeking to impeach plaintiff with plaintiff's executed deposition. And, as against a proffered explanation of "nervousness", defendant had the right to establish that the deposition had been read over prior to execution and that no changes were made although the plaintiff had the right to do so. For the Court to instruct the jury otherwise and to criticize and chastise defense counsel for his efforts to use this deposition in a normal and permissible fashion was highly prejudicial to the defendant, especially by reason of the fact that the accident was unwitnessed and plaintiff's credibility was a key issue in the case.

c—*Other instances of prejudice to the defendant.*

The "Ardizzone incident". In order to appreciate what occurred, this Court should know that Mr. Roy Ardizzone was the compensation claims manager of the defendant's insurance carrier and that he had come to Court that morning pursuant to a subpoena (A298) that plaintiff had served upon the defendant's compensation insurance carrier. He was seated in the back of the courtroom.

For no apparent reason, Judge Cooper, in the presence of the jury, suddenly called him to his feet (A284) and berated him for allegedly showing open disgust which Mr. Ardizzone denied (A285). After severely admonishing Mr. Ardizzone, Judge Cooper then called him forward into the well of the Court and took his name and address and *asked whether he was known to either of the parties* (A285-286). After being advised that he was known to the Defendant's attorney, Judge Cooper asked for the relationship—at which time defendant's counsel sought to approach the bench and discuss this matter out of the presence of the jury in order to head off the injection of insurance into what was already a highly prejudicial

situation (A286). Judge Cooper, however, *insisted on having the answer given in the presence of the jury* and Mr. Ardizzone then stated that he is with the carrier and that answer was then repeated by the Court. Defense counsel moved for a mistrial at that point and the motion was denied (A286).

Thereafter, Ardizzone was excoriated (A291) outside the presence of the jury for "slumping in your seat and turning your head with disgust." He was then compared to a "cheap bail bondsman" who snorts, sneers and belittles (A292).

When Ardizzone attempted to apologize for having given any such impression and stated that such was not his intention, he was termed "false" (A292). The Court then turned its fury on defense counsel who explained his purpose in wanting to read the plaintiff's entire deposition (A295-296) and was told by the Court that it was *"incensed,"* and he was accused of bringing a *"ruffian"* into the courtroom (A296).

The hostile climate of the courtroom may also be appreciated by the following incidents.

To offset the suggestion by plaintiff that defendant was picking and choosing parts of his deposition out of context, defendant's attorney proposed to read the entire deposition (A283). For this, defense counsel was accused by the Court of employing some *"tactic"* and was told that *"you are all wrong and you know full well you are all wrong"* (A284).

Defense counsel was further castigated in front of the jury for wanting to put plaintiff's entire deposition in evidence (A287-288).

When defense counsel explained outside the jury's presence his reasons for wanting to read plaintiff's entire deposition (A295-296), he was told that the Court was getting *"incensed"* (A296).

The defendant was not allowed by the Court to have the original executed transcript of plaintiff's deposition marked in evidence (A363-365), although he was finally permitted to read it to the jury when plaintiff's attorney stated he had no objection (A363). However, just prior to this reading, one of the *jurors* volunteered to assist with the same and was told by the Court (A366):

"No, *you are there to be sold a bill of goods.* No. No."

In this thoroughly improper and disparaging fashion were defendant's efforts to impeach plaintiff's credibility emasculated.

Again, during the course of defendant's reading of the plaintiff's deposition, the jury was told by the Trial Judge that it was "entirely unnecessary and not helpful at all" (A431).

At the end of the deposition, defense counsel was again criticized by the Court for spending an "inordinate amount of time" (A442-443). Further criticism of counsel for having "erred sadly in many respects" was given to the jury just prior to the day's recess (A445).

When defense counsel read 6 questions and answers to plaintiff from his deposition (relating to a possible slipping on account the vessels movement in the water) as a prelude for testimony later to come from Rankin that the plaintiff had admitted in the hospital to a movement of the boat on the water causing him to fall (A610), he was again criticized by the Court (A453-454).

Defense counsel was further chastised and criticized by the Court for having made notations on the cover of Capt.

De Graff's deposition of the portions he wanted to read even though no words were touched or changed (A458-461).

The fact of defendant's insurance was again injected into the case, this time by plaintiff's attorney reading a portion from defendant's deposition which portion he admitted he had not intended to read (A519-522) and defendant's motion for a mistrial was denied.

Even when plaintiff's attorney admitted that there was no testimony by anyone that the wire contained a fish hook (A602), the Court continued to reserve decision on defendant's motion to strike and kept such issue in the case even longer.

d—*The plaintiff's summation*—

In the approximate 3½ year period between the happening of the accident and the trial, the plaintiff had been unable to work for approximately 12 or 13 months, and had lost earnings in the stipulated amount of $11,400. During the rest of that period of time, and at the time of trial, plaintiff was employed by the defendant.

With no basis for it whatever in the record, plaintiff's attorney (whose practice includes many clients from this strongly unionized industry) argued to the jury *that defendant had some ulterior motive in employing the plaintiff and that plaintiff would be discharged after the case* was over (A850-851). Defendant's objection to such inflammatory and improper argument was overruled by the Court (A851), and plaintiff's attorney then persisted further in the argument (A851).

Only recently, in a case where there was proof of an actual non-return to work, but for unrelated reasons, and where plaintiff's attorney argued on summation for the loss of wages and the making of the plaintiff into a scape-

goat, this Court termed the summation both "intemperate" and a contributing cause to an excessive verdict, *Sharkey* v. *Penn Central Transportation Co.*, 2nd Cir., decided 3/1/74. How much more intemperate and prejudicial is such a summation in a case where there has been an actual return to defendant's employ and there was no basis at all for arguing that he would be fired after the trial.

Plaintiff's attorney then concluded his summation by advising the jury that he sued for $500,000 and that it was *"now or never"* for the plaintiff (A856), an argument that curiously was later echoed by the Court in its charge (A905).

e—*By its tone, emphasis and content, the Court's charge to the jury became a super summation for the plaintiff and exceeded the bounds of proper comment.*

With the issue having been limited to a claimed failure to supply an adequate number of men for the job, the Court limited counsel to 45 minutes apiece for summation (A731). But the Court took approximately 2½ hours to charge the jury. This extended charge by an extremely articulate Judge became an emotional and highly partisan request for substantial money damages against the defendant.

Although stating to the jury that he does not and will not comment on the evidence because the views of a persuasive judge will be adopted by almost all the members of the jury (A863), Judge Cooper did that very thing under the guise of giving legal instructions and became an advocate for the plaintiff. For example, at the very outset the jury was charged that *"every case is a big case"* (A857).

After telling the jury at length that the defendant is negligent if more than one man is required to do the job

(without discussing proximate cause) (A872-875) the Court stated (A875):

"Do you catch my meaning?"

This subtle way of telling the jury that the Court had determined the negligence issue against the defendant was then immediately followed by a statement (A875):

"The same degree, of course, of reasonable care is applicable to *a corporation, a mighty corporation,* or a single person."

The fact that plaintiff's proof completely failed to show how and why the accident happened was excused by the Court in the following statement (A876):

"Accidents that result from momentary conduct usually present difficulty in describing with exactitude just what occurred."

After telling the jury that the amount of care to be exercised by a defendant differs from occasion to occasion and that a greater degree of care is required when there are greater probabilities of danger, the Court charged (A877):

"Was this, as the plaintiff would have us believe, was he operating under conditions which were almost unnerving, if he is to be believed? The noise, the care which he would require, the man at the door? What about a pinochle game? No, there was danger to life and limb while that operation was going on. That is conceded by both sides, by every witness. That requires responsibility.

What went on in that cab affected the destiny of other human beings. Would you say that one person could have done that?"

The evidence only showed a routine maintenance operation and there was neither proof by plaintiff nor concession by defendant that the work going on was especially hazardous. To magnify this rather pedestrian task of operating a very small winch to a job that effects the destiny of other human beings, after having instructed the jury that the degree of care increased proportionate to the danger, was prejudicial.

The Court then became an open advocate for the plaintiff and summed up for him by answering an argument made by defense counsel (A878):

> "Mr. Cohen for instance tells us that Mr. Ducey said he had no orders to give. Well, was there any proof that the plaintiff knew that Ducey didn't have any orders to give? Or would you say from the evidence that the plaintiff had reason to believe that while he was operating in that cab there might be an order that has to be shouted?"

The defendant's obligation to provide an adequate number of men was again charged (A880).

Although telling the jury to take into account all the circumstances including the noises made by machinery, the Court instructed the jury that the fact that the accident occurred on a Sunday when the regular workday operation was not being performed is irrelevant (A881), even though this would mean that the normal workday noises were absent.

The defendant's duty to furnish sufficient manpower was again discussed by the Court (A882); and the jury was charged that as plaintiff had been "assigned a task involving considerable danger" (A882), a lesser degree of care and caution was therefore to be expected of him (A883). The jury was further told (A883):

"We say two heads are better than one so there are occasions when four hands are better than two.",

a little homily in support of plaintiff's claim.

The argument in the defendant's summation that Capt. De Graff finished by himself the job the plaintiff had started was responded to *by the Trial Judge* as follows (A883-884):

"The captain finished the job, but as I recall the evidence, the harder part of starting the cable under the drum had been completed by the plaintiff. *The captain was much more experienced, older and more powerful than the plaintiff.* And you have to consider that, too, if you believe so.

There is no testimony as to whether his long life at this work had so accustomed him to noise that he was unaffected thereby. In other words, there was nothing to show whether this seasoned captain was affected in any way by the noise.

The test is not what the extraordinary person can accomplish when fulfilling an assignment; it is what the ordinary able man exercising reasonable care and caution can accomplish in carrying out the same assignment.

Further, immediately after any accident the human tendency is to apply maximum care and to tread much more carefully and cautiously than otherwise."

Again we see in the guise of a legal charge a highly partisan argument tending to support the claim and dispose of contrary fact. There was no basis in the record for the Court's characterizing Capt. De Graff as an "extraordinary person" nor is there any indication in the record that operating the winch to take on the cable was any harder for the first 6′ than for the balance of 200′. By making this kind of an argument against the fact that one elderly man

was able to complete the job plaintiff had been doing, the Court was no longer acting as an impartial arbiter but rather as another advocate for the plaintiff.

The obligation to provide enough men was again gone into at length (A888-893).

In connection with the charge on contributory negligence, Judge Cooper told the jury that Capt. DeGraff had stated under oath that "tapping the cable was the *almost invariable practice* among the crew" (A896), even though that was not his testimony (A692-693).

He further told the jury that Capt. Wheeler testified that the tapping would bring about a non-essential perfect winding (A896-897), which was not the essence of Captain Wheeler's testimony at all (A647-650, A657-658). And, to completely exonerate the plaintiff from any fault, Judge Cooper told the jury (A897):

> "Moreover, a seaman does not assume any risk of injury which results from his use of a known unsafe appliance or method, although he had a free choice to avoid the use of it. So said the Supreme Court.
>
> Accordingly, if you find by reason of the particular winch then in operation that it was necessary for the plaintiff to tap the cable with his hand in order to more effectively wind it around the winch, then he cannot be held accountable for resorting to such a practice, even though he knew it was unsafe to do so and that a safer practice might have been available."

In the context of contributory negligence, Judge Cooper told the jury that *"hindsight is the cheapest form of wisdom"* (A899). This is an advocate's argument generally used to combat a claim of contributory negligence and is not a proper element of a charge on the law. Isn't it odd

also, that this bit of wisdom was applied solely to the contributory negligence issue and not the primary negligence claim?

Although the Court had advised defense counsel that he would charge the jury that no income tax is to be paid on any recovery obtained by the Plaintiff (A797-798), what the Court actually charged was that the jury in considering the likelihood of future wage increases should not consider the tax bite on the same (A905).

Paraphrasing the summation argument of plaintiff's attorney, the Court then told the jury that for the plaintiff (A905):

> "This is it, to use the vernacular".

The fact that the defendant must also obtain justice at this moment in time and is unable to return to Court was not mentioned by the trial judge.

In a case where the plaintiff's attorney was making a very substantial claim for a loss of earnings for the balance of this young man's working life, the Court, after charging on loss of earnings, then stated (A906):

> "Now, ladies and gentlemen, *more important than anything* is another item, the one dealing with pain and suffering, . . ."

The jury was thus *told* to award even more for pain and suffering than for loss of earnings. This, in a case, where plaintiff's own proof indicated that treatment was still continuing and where further improvement was an issue.

A not so subtle call for punitive damages was made by the Court as follows (A907):

> "It has been a very common observation that there is no precise yardstick which the Court can give you to

measure pain and suffering. If one loses a leg or an arm or a hand for a cause, especially a noble cause, compensation for that loss is in the spiritual contentment of recognizing it was something of a holy mission.

It is different when a loss is sustained through fault, and that the law recognizes."

Nor, should this plaintiff's injuries have been equated to the loss of a limb.

A very emotional argument was then made by the Court (A907-908):

"Do you believe him when he says he can't hold his baby in his left arm? If you do, is that a matter of indifference? Is his earning power the only thing that counts in life? Or is it the ability to hold a baby in your left arm? If it's true, and if you believe it. Is it true that he can't play pool? If you believe it, what is that worth?

You may want to read books, play golf, work in a laboratory, be a teacher. He wants to play pool. Nothing wrong with that; if you believe him to be deprived of that privilege. The law says it is a matter up to you.

Now, there are varying degrees of pain and suffering. The plaintiff contends that the proof warrants your finding that he is now and always will be experiencing substantial periods of pain; that in his case there are few compensatory physical functions upon which he can rely so that life can have its former zest and satisfaction."

There was repeated emphasis on an award for pain, suffering, shock and embarrassment and loss of life's enjoyment (A910) and the Court stated emotionally (A911):

"The law says that you cannot restore that enjoyment if you find that it has been lost or that deep satisfac-

> tion, if you find that there was and it has been lost, or that satisfying reaction to an enterprise which makes all else seem rosy. You can't bring that back. But a man has a perfect right to have had it and a perfect right to continue to have it".

This was sheer advocacy for a claim not expressed by plaintiff or his attorney.

The plaintiff's failure to give a cause for the accident as well as the inconsistencies and contradictions in his testimony and upon his deposition were excused by the Court as follows (A914):

> "You don't expect one who uses his hands to be as articulate as the one who by training had frequent occasion to do that to express himself".

The Court returned to this theme (A915-916):

> "You might consider whether plaintiff has in fact a limited vocabulary and finds difficulty in expressing himself. If so that might account for his inability to explain things in detail".

By this apologia, plaintiffs contradictory statements were brushed away, as was defendant's right to have its challenge to his credibility fairly heard and evaluated.

The defense witnesses, DeGraff and Rankin, were *singled out* by the Court for special attention in its charge. The Court suggested to the jury that perhaps Capt. De Graff lied in order to exonerate himself for any blame for the accident (A914-915), and then the Court suggested that Rankin was seeking to minimize the situation (A919). At no time in instructing the jury on how to evaluate witnesses did the Court suggest that either the plaintiff or his witnesses might have motives to falsify or exaggerate. Indeed,

the Court inferred to the jury that plaintiff's witnesses were truthful because in the Court's view (A920):

> "I do not recall that cross-examination attempted to establish any motive by Ducey to say what he did or that it was even said during summation for the defense".

The fact that plaintiff's counsel had not cross-examined to establish motives to falsify on the part of De Graff and Rankin was not mentioned.

A further emotional and very prejudicial statement by the Court to the jury suggested that the defendant was trying to *"pull the wool"* over its eyes and that but for the Court it would be *"like taking candy from a baby"* (A917).

Although the Court had stricken all references to fish hooks from the case, it then argued to the jury in its charge that if plaintiff was inclined to falsify he would have said that fish hooks were present in the wire (A919). Not only was the stricken fish hook testimony thus resurrected, but this statement by the Court was sheer partisan argument and out of bounds.

The foregoing examples have been taken from the trial minutes in an attempt to illustrate the type of lengthy, prejudicial, emotional harangue that was masqueraded as a charge. It was a masterful piece of slanted advocacy whose full effect can truly only be appreciated by those who heard and saw the same *in toto* with its unique delivery, expressions and tone. It was a far more effective summation for the plaintiff than that which had earlier been given by his attorney, as a comparison reading of the two will disclose. Defendant objected to the same (A927-932).

The jury thereafter requested a re-reading of certain parts of Capt. De Graff's testimony (A943). The Court only

read to them, however, portions of the deposition of De Graff that had been taken by plaintiff. When defense counsel asked that De Graff's live testimony in Court also be read in compliance with the jury's request, he was once again scolded by the Court (A947).

The jury thereafter requested a further charge on negligence and contributory negligence (A957). In recharging the jury the Court once again attributed to Capt. De Graff testimony that he had not given regarding tapping of the wire (A975) which defense counsel had earlier excepted to (A931). The Court further charged the jury that there was *no evidence* that plaintiff's tapping of the wire was an improper, wrong or abusive method (A976); when one of the main points of the defendant was that it's dangerous, unsafe and improper to tap the wire as was testified to by De Graff and Wheeler (A648-650, A689-690).

Again, solely in connection with contributory negligence, the jury was told by the Court "that hindsight is the cheapest form of wisdom" (A977). Further, in the context of charging on contributory negligence, the *Court emphasized to the jury that the plaintiff should recover* and stated (A977):

> "He has a right to have a recovery against the defendant".

This is tantamount to directing a verdict against the defendant.

In sum, defendant contends that by assisting in putting in the plaintiff's case, by continually demeaning and criticizing defense counsel, by belittling the defense's position, by depriving defendant of rightful and proper defense tools, and by a highly partisan, argumentative charge to the jury, the Court deprived the defendant of its right

to a fair trial in an impartial, judicious and dignified atmosphere. The *cumulative effect* of what the Trial Judge did was terribly prejudicial to the defendant and may not be excused by the admitted right of a Federal Judge to make comment.

Since the sensitivity of juries to every utterance of a Trial Judge is established as a matter of judicial notice, *Bursten* v. *United States,* 395 F.2d 976, in exercising the privilege of comment the Judge must be extremely careful lest he communicate a prejudicial partisanship to the jury, *Moody* v. *United States,* 377 F.2d 175. Indeed, as the last cited case indicates, even an admonition to the jury that they are not bound by the Judge's opinion does not cure the prejudice.

Because of the tremendous influence that a Trial Judge has, this privilege of comment has rather definite limitations which are aptly set forth in *Quercia* v. *United States,* 289 U.S. 466, 470, 53 S.Ct. 698, 699. He may not be one-sided and may not charge a jury upon conjectural facts without evidence, and he may not indulge in *hostile comment that nullifies an available defense.* When the Trial Judge discusses the evidence, "he must do so impartially and abstain from advocacy for either party", *Myers* v. *George,* 271 F.2d 168, 173. The conduct of the Trial Judge must meet a standard of "fairness and impartiality", *Greener* v. *Green,* 460 F.2d 1279. He may not try by one means or another to impose his own opinions and conclusions on the jury and his fairness is to be judged in the context of the entire trial record *United States* v. *Tourine,* 428 F.2d 865.

It is respectfully submitted that this entire trial record when judged by these standards discloses such a prejudicial lack of impartiality, such a one sided partisan-

ship, such a continual denigration of the defense and its counsel, that a new trial must be had in the interest of justice. The abuse of power by the court below is no more to be condoned than an abuse of power by the executive.

Just as the proof of the pudding may be in the eating, so is the proof of defendant's contentions on this point to be found in the grossly excessive damage verdict that was rendered for the plaintiff.

POINT III

An Award of $500,000 to the Plaintiff for the Damages and Injuries Sustained by Him in This Case Was Grossly Excessive.

The only doctor who testified for the plaintiff was Dr. Mauer who had not treated him and who had first examined him on September 4, 1973 and again on the morning that he testified (A711). Dr. Mauer testified that the plaintiff who is right-handed (A731) sustained a fractured humerus of the left arm with some paralysis of the nerve that supplies the muscles which control wrist and finger extension (A720). The fractured left humerus was plated and Dr. Mauer testified that x-ray examination disclosed that bone to be "completely healed" (A723). The left arm was "perfectly okay functionally" (A724).

Dr. Mauer testified (A714) that on his examination he found several healed scars and that the plaintiff was able to extend or straighten his wrist. However, flexion of the wrist was extremely weak. The plaintiff had sustained a wrist drop (A715) which through surgery was corrected to some extent (A715). The grip was good although there was some lack of sensation, and the plaintiff's ability to bring up his thumb in a hitchhiking mo-

tion was only 50% of normal (A716). Whereas extension of the right wrist was to a normal 90°, the left wrist only extended to about 60° and there was some droop of the 4th and 5th fingers (A716). There was also some loss in supination compared with the right wrist (A716-718). He lacked about 10° of radial deviation and about 10° terminal pronation on the left hand as compared to the right (A718-719).

Dr. Mauer testified on direct examination that the plaintiff has *"only a 1/2 useful wrist • • • functionally his wrist is a useful wrist but anatomically he still has a paralyzed wrist"* (A726). Dr. Mauer testified this is a permanent condition (A727). It is to be noted that this very same left wrist was fractured by the plaintiff in a subsequent accident and that occurred in August of 1972 (A725) at which time he broke the navicular, radius, and ulnar bones of his left hand (A732, 767-768).

For the purposes of this appeal, there is no point in dwelling upon conflicting testimony given by defendant's examining physician, but it was not disputed that the plaintiff was now able to lift 30 lbs. with his left hand (A758-759, 764); that the x-ray report in the hospital records showed the fracture of the humerus to have healed with good union in satisfactory position (A764-765); and that the most recent report in the hospital record dated January 30, 1974, showed that isometric exercises were being prescribed (A772) and that such exercises would strengthen the muscles and yield greater use and grasping power (A773) and would bring about even more improvement in the plaintiff's condition (A775-776).

The plaintiff was born here on May 6, 1950 and was thus over 20 years old at the time of the accident, and his education included two years of high school (A34). As reflected by his tax returns (plaintiff's Exhibit 4), and

by stipulation (A533) the plaintiff's earnings were as follows:

1968	$10,738	
1969	11,656	
1970	10,917	
1971	4,804	
1972	9,552	
1973	13,434	
1974	1,447	(up to Feb. 3, 1974)

Following the accident of October 18, 1970, the plaintiff was hospitalized until November 18, 1970, a period of 31 days (A99-101). He was hospitalized a second time for treatment of the wrist drop by means of a Jones transplant from May 22, 1972 through June 7, 1972, a period of 16 days.

It was stipulated by counsel that from the time of the accident of October 18, 1970 up until the time of trial the plaintiff was disabled for approximately 12 or 13 months and lost a total amount of earnings of $11,400, as against which he was paid maintenance of $3,374 (A589-590). The plaintiff's description of his condition was given in response to both his attorney's questions (A104-109) and the Court's questions (A115-116).

The plaintiff's job classification is now that of a "day man" (A109) rather than that of deck hand or relief mate which he was at the time of the accident (A108-109). However, he received the same rate of pay and the earnings' record as set forth above discloses that he is now earning more than he ever had prior to this accident.

In considering not only the objective factors but also the subjective claims of the plaintiff and the opinion of his own examining physician, it is respectfully submitted that by any fair criteria an award to this plaintiff of

$500,000 was grossly excessive. Such a sum of money, invested in either a savings account at 6% or treasury bills at 8½% would generate interest of between $30,000. and $45,000. a year without any impairment of the principal. That interest alone would represent three times or so what this plaintiff had been earning. And bearing in mind that he is and has been able to work and that he is otherwise healthy and husky except for what his own doctor called a 50% loss of use of the left wrist, the enormity of the excessiveness of this verdict is apparent.

This Court has the right to examine the amount of verdicts and to set aside or reduce those which are excessive, *Caldecott* v. *Long Island Lighting Company,* 417 F.2d 994; and *Dagnello* v. *Long Island Railroad Company,* 289 F.2d 797. The power has been exercised in appropriate cases, see *Wicks* v. *Henken,* 378 F.2d 395, and the cases therein cited; and most recently, *Sharkey* v. *Penn Central Transportation Company,* 2 Cir. 3/1/74.

The excessiveness of awarding $500,000 to this plaintiff is pointed up by the amounts of recovery in other cases involving injuries even more grievous. Thus, in *Yost* v. *General Electric Company,* 173 F.Supp. 630 (S.D.N.Y. 1959) $125,000 was awarded for an amputation of the left arm 2 inches below the elbow and 4 distal and middle phalanxes of the right hand. In *Conte* v. *Flota Mercante,* 189 F.Supp. 67 (S.D.N.Y. 1960) there was an amputation of the right hand at the wrist leaving only the thumb, and the award was $55,000. In *Pierce* v. *United States,* 142 F.Supp. 721, aff'd. 235 F.2d 466, damages of about $54,000 were awarded for burn injuries which resulted in both arms being amputated above the wrists. In *St. Louis Southern Railroad Company* v. *Ferguson,* 182 F.2d 949, there was an award of $150,000 for the amputation of the left leg and for a right arm that was severed 3 inches above

the wrist. In *June T Inc.* v. *King,* 290 F.2d 404 there was an award of $21,000 for traumatic amputation of the second, third and fourth fingers of the left hand. In *Carlson* v. *Chisholm-Moore Hoist Corporation,* 281 F.2d 766, this Court affirmed a judgment of $50,000 for injuries which included amputation of the plaintiff's left thumb and his right thumb, index finger and middle finger. In *Elliott* v. *United States Steel Corporation,* 194 F.Supp. 936, there was a recovery of $45,000 for traumatic amputation of the index, middle, and ring fingers together with a portion of the thumb of the right hand. In *Hudgins* v. *Gregory,* 219 F.2d 255, involving an amputation of the thumb and index fingers of plaintiff's left hand, there was a recovery of $32,000.

The case of *Colley* v. *The State of New York,* 152 N.Y.S. 2d 968 is of interest because the plaintiff there was able to obtain employment as a crane operator, to which this plaintiff aspires, notwithstanding traumatic amputation of the third and fourth fingers and parts of the first and second fingers of the right hand causing an approximate *50% loss of use of the right hand.*

We appreciate that the cases above-cited were in the main decided about ten to fifteen years ago and that values have changed somewhat. However, all of those cases involved traumatic amputations, and the plaintiff in the case at bar has had no amputation. The injuries to this plaintiff are substantially lesser in severity than those in the cited cases.

The award to this plaintiff of $500,000 should be compared to a recent award of $528,000 in the case of *Rocha* v. *The State of New York,* 352 N.Y.S. 2d 990 (Court of Claims Feb. 22, 1974). Mr. Rocha was a young man rendered permanently and totally unemployable by reason of the most horrible injuries causing deteriorating conditions in the bladder, urethra and kidneys, rendering him

impotent, making it impossible for him to ever walk without the use of crutches, and giving him continual pain whether he be sitting or standing. To award an almost identical amount to this plaintiff who has been and will continue to be employable, who sustained a fractured humerus which healed, and whose present claimed disability is a 50% loss of use of the left hand although he is able to lift 30 lbs. with the same, is grossly excessive.

We do not mean to suggest that this plaintiff sustained contusions and abrasions. He did receive serious injuries which are worth, if there be liability, a substantial amount of money. However, the injuries are nowhere that serious and disabling as to warrant an award of $500,000. We think that a fair evaluation and appraisal of this plaintiff's injuries and damages should not exceed $150,000. The award of $500,000 was grossly excessive and is the end result of the prejudicial and inflammatory atmosphere in the courtroom created by the matters discussed *supra*.

CONCLUSION

The judgment appealed from should be reversed and the instant action dismissed by reason of the plaintiff's failure to establish a prima facie case of negligence; or in the alternative, there should be a new trial.

Respectfully submitted,

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